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IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. 1046

WILLIAM HAILPARN,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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WILLIAM HAILPARN,

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STATE OF NEW JERSEY,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, William Hailparn, eighteen years of age, respectfully prays that a writ of *certiorari* issue to review the judgment entered against him in the New Jersey Supreme Court on November 14, 1967, denying his application for certification to review a judgment of the Appellate Division of the Superior Court of New Jersey filed September 21, 1967, which in turn had denied petitioner's application for leave to appeal from an Order of the Middlesex County Court dated August 23, 1967, *denying petitioner's application to suppress certain evidence obtained through an alleged unlawful search and seizure.*

Opinions Below

1. There was no written opinion of the Middlesex County Court (the Court of first instance to deal with the application to suppress). That Court's conclusions were delivered orally from the bench, and they are reproduced as Appendix A to this Petition (A1a).

2. The formal Order of the Middlesex County Court—entered pursuant to the aforesaid oral conclusions—is reproduced as Appendix B to this Petition (A4a).

3. No formal opinion was rendered in the Appellate Division of the Superior Court of New Jersey denying petitioner's application for leave to appeal from the aforesaid Order entered in the Middlesex County Court, but the formal Order of denial is reproduced as Appendix C to this Petition (A6a).

4. No formal opinion was rendered in the Supreme Court of New Jersey denying petitioner's application for certification to review the aforesaid Order entered in the Appellate Division, but the formal Order denying certification is reproduced as Appendix D to this Petition (A8a).

Jurisdiction

The Order of the New Jersey Supreme Court denying certification was entered November 14, 1967. This was a final judgment rendered by the highest court of New Jersey in which a decision could be had, and this Court has jurisdiction to review the said judgment herein by writ of *certiorari* under 28 U. S. C., Section 1257(3), since rights guaranteed under the Fourth Amendment to the United States Constitution were and are set up and claimed by the petitioner.

Questions Presented

1. In the absence of a search warrant, and when concededly the search was not incidental to or contemporaneous with an arrest, may a police officer direct and order a defendant (petitioner) to remove the contents of his automobile, and then, on the strength of contents taken by the officer from the trunk, charge the defendant (petitioner) with possessing contraband—or does the Fourth Amendment protect defendant from such search and seizure?

2. Is not a direction and order to petitioner, under arrest, from police officers to remove the contents of his automobile—and compliance therewith—the antithesis of a voluntary submission to a search?

Statutes and Provisions of the United States Constitution Involved

1. The New Jersey Criminal Procedure Rule pursuant to which petitioner applied in the first instance to suppress the evidence seized by the police officers is 3:2A-6(a), and it is reproduced as Appendix E to this Petition (A9a).

2. The Fourth Amendment to the United States Constitution—upon which petitioner predicated his application to suppress—is reproduced as Appendix F to this Petition (A11a).

3. The New Jersey statute under which petitioner was charged with possessing contraband is N.J.S.A. 24:18-4 and is reproduced as Appendix G to this Petition (A12a).

Statement of the Case

(Emphasis supplied.)

Petitioner, eighteen years of age, was arrested July 25, 1967, with a friend of his, Thomas Gaines, under eighteen years of age. They were taken into custody in the early

hours of July 25 when they were found asleep in their automobile in the Great Eastern parking lot on Route 1 in New Brunswick, New Jersey.

Petitioner produced his driver's license at the parking lot upon request of police officers who interrogated him there, but he could not produce the registration certificate. He was brought to police headquarters where he still could not produce the automobile registration, and both petitioner and Gaines were then booked under a formal charge of failing to give a good account of themselves—"Vagrancy" under N.J.S.A. 2A:170-1. (This statute was declared constitutionally unenforceable because of vagueness in *U. S.* v. *Margeson,* 259 F. Supp. 256, 269—E. D. Pa.—1966). Apparently, the police did not believe their statement that they had bought the car the preceding day and were on their way to Miami, to which place the registration was to be sent.

A half hour (or more) after petitioner was booked, the police officers went out into the yard and searched the automobile *after directing petitioner to remove his belongings therefrom.*

The details of the search will be discussed, *infra.* Suffice it to say at this point, *the Prosecutor conceded what was obvious: that such a search was not incidental to or contemporaneous with the arrest* (App. O—A30a; also App. B—A4a).

In the course of complying with the *direction* to remove his suitcase from the trunk where it was wedged in, petitioner pulled the suitcase out of the trunk, whereupon, according to the officer, a tin-foil envelope fell from behind the suitcase *to the floor of the trunk—still inside the automobile* (R29a). One of the police officers picked it out of the car—without petitioner's permission—fondled it, and con-

cluded that it was contraband. He then made a further search of the trunk and came up with a can, likewise allegedly containing contraband. It was claimed that the contraband was marihuana.

The Complaint for possessing marihuana was filed after the search was made, after the officer went to the police laboratory in Trenton, and after he had returned to New Brunswick. A copy of the Complaint in the Magistrate's Court is reproduced as Appendix H to this Petition (A13a).

At the preliminary examination in the Magistrate's Court, an objection was raised with respect to any proof pertaining to the alleged unlawful search. The Presiding Judge frankly stated that as Magistrate he could not rule upon Federal constitutional questions but would have to leave them up to the County or Superior Court. Crim. Proc. Rule 3:2A-6 (see Appendix E to this Petition—(A9a).

Petitioner was held for the Grand Jury—despite the fact that even in the Magistrate's Court where constitutional questions could not be decided petitioner had raised the following objection: that the search was unreasonable under the Fourth Amendment in that it was not incidental to or contemporaneous with a legal arrest or supported by a search warrant (App. I—A15a). Part of this issue is now out of the case, as the Prosecutor conceded that the search was not incidental to or contemporaneous with a legal arrest. No search warrant was ever obtained.

The motion to suppress was formally prosecuted in the Middlesex County Court, and again the rights guaranteed by the Fourth Amendment were urged as a basis for relief. The notice of motion raising the Federal question is reproduced as Appendix J to this Petition (A16a).

The County Judge denied the motion, taking the position—in view of the State's concession that the search could not be justified as being incidental to an arrest—that the search resulted from a voluntary submission thereto by petitioner. The County Court's oral conclusions and the Order denying the application to suppress are reproduced as Appendices A and B respectively (A1a-4a). The State's concession and its reliance solely upon an alleged voluntary submission by petitioner limits considerably the argument to be made herein.

Leave to appeal was denied without opinion by the Appellate Division of the Superior Court of New Jersey. Reliance upon a violation of petitioner's right of privacy guaranteed by the Fourth Amendment was clearly set forth in the Petition for leave to appeal in the Appellate Division. A portion of the Petition is reproduced as Appendix K to this Petition (A17a). The Order denying review is printed as Appendix C (A6a).

Petitioner's application to the Supreme Court of New Jersey for certification was likewise denied by that Court —without opinion. Reliance upon the Fourth Amendment was specifically set forth in one of the questions submitted to the Supreme Court. It is reproduced as Appendix L to this Petition (A18a). The Order denying certification is printed as Appendix D (A18a).

Because petitioner never *voluntarily consented* to a search of his automobile, and because the actual opening of the trunk was the result *not of a request from the police officers but of a direction and order* to do so, petitioner's rights or privacy guaranteed to him under the Fourth Amendment have been violated, and he looks to this Court —truly in this instance, a Court of last resort—for relief.

We are met *in limine* with a possible claim that the Order sought to be reviewed does not possess the features of finality to warrant review under 28 U. S. C. 1257(3). It has been held that an Order entered upon an application to suppress prosecuted under Rule 41(e) of the *Federal* Rules of Criminal Procedure cannot be reviewed because it is regarded as interlocutory rather than final.

Di Bella v. *U. S.*, 369 U. S. 121 (1962).

A distinction, however, lies between the treatments of applications to suppress in the Federal Courts and in the State Courts. In New Jersey, for example, an Order denying suppression following an application under Crim. Proc. Rule 3:2A-6(a), (as was done in the case at bar) is *res adjudicata and becomes the law of the case.* If the Grand Jury indicts and a defendant is put to trial, he cannot object to the admission of evidence which had been the subject matter of an application to suppress. *So far as a defendant is concerned, the Order denying suppression is final.*

The decisions in New Jersey to that effect are clear. The following cases demonstrate this:

> "The motion to suppress made after the first indictment having been denied, *the denial became the law of the case,* and the defendant had no right to repeat the motion simply because there was a second indictment. Once such a motion was made and the court ruled that the attack therein mounted was unwarranted, the evidence could thereafter be used in any proceeding in which it was material."
>
> *State* v. *Bell,* 89 N. J. Super. 347 (App. Div. 1965); 1963); 188 A. (2) 308; modified on other grounds 46 N. J. 109 (Supreme Ct. 1965) 215 A. (2) 16.

* * *

"On this appeal defendant argues that the evidence used against him was obtained by the police as the result of an unlawful search and seizure and that Judge Rosen who heard defendant's pretrial motion to suppress that evidence but did not preside at the trial, erred in denying the motion. Defendant unsuccessfully attempted to review the motion at the trial. The trial judge ruled, and properly so, that *Judge Rosen's denial of the pretrial motion became the law of the case.* * * *"

State v. *Bell,* 89 N. J. Super. 437 (App. Div. 1965); 215 A. (2) 369.

* * *

"* * * The purpose of the rule requiring a pretrial motion to suppress is to avoid involvment of collateral issues during the course of a criminal trial. * * *"

State v. *Wade,* 89 N. J. Super. 139-147 (App. Div. 1965); 214 A. (2) 411.

* * *

There is no doubt, therefore, that Orders denying suppression of evidence are treated differently in the Federal system and in New Jersey. Since *Di Bella, supra,* an Order denying suppression under Federal Criminal Rule 41 (e) may not be appealed.

But New Jersey regards its correlative procedure differently. An Order denying suppression of evidence under Crim. Proc. Rule 3:2A-6(a) is a *final* Order, and a failure to appeal from it constitutes a waiver. In *State* v. *Puryear,* 94 N. J. Super. 125 at 136 (App. Div. 1967) 227 A. (2) 139; cert. granted on other grounds 49 N. J. 365 (Supreme Ct. 1967) 230 A. (2) 398, a pretrial motion had been prosecuted by defendant to suppress evidence. This is what the Court had to say when defendant took no steps to review the Order denying suppression:

> "* * * No appeal was taken from the interlocutory order denying his motion. * * * *In the circumstances defendant should be deemed to have waived any objection to its admission during the trial.* * *"

Obviously in New Jersey the Order denying suppression possesses those qualities of finality warranting immediate review. This Court, then, should, we respectfully submit, regard the Order under review as being final in the sense that it qualifies under 28 U. S. C. 1257(c).

REASONS FOR GRANTING THE WRIT

POINT I

The consent to the search upon which New Jersey's entire case depends was never in fact ever obtained.

New Jersey has decided petitioner's application to suppress in a way probably not in accord with applicable decisions of this Court. As we interpret the Federal decisions which have dealt with the problem herein involved, we feel justified in going a step further and asserting that the action of the New Jersey Courts is squarely in conflict with applicable decisions of this Court. The following features of this case move us to that conclusion:

1. We start with the premise that no search warrant was ever issued—or even applied for.

2. New Jersey's concession that it does not predicate its seizure of the contraband upon a search incidental to an arrest (*Preston* v. *U. S.*, 376 U. S. 364 (1964) limits the issue to *whether petitioner voluntarily gave his consent to have his motor vehicle searched by the police officers.*

3. On this limited issue there is absolutely no proof that the police officers requested permission to examine the contents of petitioner's automobile—and that petitioner's consent thereto was given.

4. On the contrary, the police officer described what happened fifteen or twenty minutes after the arrest for "vagrancy" had been made:

> "I told him to get his belongings and bring them to police headquarters."
>
> • • •
>
> "I said, 'Take your belongings out.'"
>
> • • •
>
> "I said, 'Take your suitcase out.'" (R21a-22a)
>
> • • •
>
> "* * * I told him to get his belongings, and he opened the trunk. Then I told him to take his suitcase and bring it into police headquarters." (R22a)
>
> • • •
>
> "Q: And as he pulled that suitcase out, this tin-foil fell onto the floor of the trunk?
> A: Right.
> Q: Didn't fall outside, did it?
> A: No, sir, it fell onto the floor of the trunk.
> Q: Now, at that moment you didn't know what was in there, did you?
> A: No, I did not. (R29a)
>
> • • •
>
> Q: Now, up to the time that you pulled that tin-foil envelope from inside the trunk and put it in your hands, you had no idea what was in there, did you?
> A: No, I had no idea of what was in the envelope at all. It felt like meat to me.

Q: *Did you ask him whether you could pick it up?*
A: *No, I did not.*
Q: *You did that of your own volition, didn't you?*
A: *Yes.*" (R29a)

This, we submit, can hardly be regarded as "voluntary consent!"

5. Besides, in the fifteen or twenty minutes that the police officers were conversing with petitioner before ordering him to bring the contents of his automobile into headquarters, not once did the officers tell petitioner that they were concerned with safekeeping of the contents.

"Q: *In the course of that conversation you didn't tell them that their property was jeopardized and you wanted it inside for safekeeping, you didn't say that?*
A: *I didn't tell them that. I told them to get their belongings and bring them into headquarters.*
Q: No, of course not. And you had as much as twenty-five minutes within which to tell them that, didn't you?
A: Could be that long. I couldn't swear how long it was. It might have been less." (R27a)

If anything, the foregoing colloquy indicates that no request was ever made—and the idea of predicating their action upon an alleged "voluntary consent" appears to have been an afterthought and a subterfuge.

6. Finally, the police officers admitted what would have happened to petitioner and his friend if he had not complied with the "direction" and "order":

"* * * We would have put them in a cell probably if they didn't want to bring them in."

And asked what would have happened to the property:

"Probably left it there. * * *" (R28a)

The foregoing clearly demonstrates that there is not one bit of proof indicating that what petitioner did when he opened the trunk of his automobile was voluntary—unless his physical act in opening the trunk in the face of surroundings that spelled immediate confinement constitutes "voluntary consent."

POINT II

New Jersey's refusal to suppress evidence procured by a search without a warrant, without being incidental to an arrest and without petitioner's consent is subject to review in this Court by certiorari.

The law is clear that in order for a search to be valid in the absence of a search warrant or a situation where the search is incidental to an arrest, it must be established that consent to the search was freely and unequivocally given by the defendant. An extremely illuminating discussion of this confined issue appears in *9 A.L.R. (3) 858* in an article entitled "Search—Consent While in Custody."

Oddly enough, the foregoing annotation is annexed to the reprint of a New Jersey decision (*State* v. *King*, 44 N. J. 346; 209 A. (2) 110—Supreme Ct. 1965), where the general rule was recognized:

> "* * * To be voluntary the consent must be 'unequivocal and specific' and 'freely and intelligently given'. (citing *Judd* v. *U. S.*, 190 F. (2) 649, 651—D. C. Cir. 1951)."

When a defendant shows that a search was made without a valid search warrant and where the search was not inci-

dental to a lawful arrest, the government has the burden of proving that the defendant consented to the search and that this consent was freely, intelligently, and unequivocally given, and was not merely given in submission to the apparent authority of an officer.

The facts listed above clearly establish that the State completely failed to bear the burden that the absence of a search warrant casts upon it. Picture two young men—one eighteen years old, the other younger—being aroused from sleep and brought to police headquarters where they were booked for "vagrancy." They had no one to advise them of their rights; the police never requested permission to examine the contents of the car even though they were conversing with petitioner for about twenty minutes before they "*ordered*" petitioner to bring the contents of the automobile inside headquarters.

Who knows what would have transpired if permission to search was requested? We can only speculate. Permission may have been granted. Permission might have been denied—in which event the police could have immediately applied for a search warrant if they could have established reasonable grounds therefor. The automobile—as well as petitioner—was in police custody, so there was no problem of vanishing evidence.

One thing is certain: *No permission was requested; no consent was vocally extended.* The undisputed proof is that petitioner was "ordered" to "bring his belongings to police headquarters," and in the face of his being dispatched to a cell—as the police testified he would be if he failed to obey the order—petitioner complied. Under the circumstances surrounding the opening of the automobile trunk and the act of the police officer grabbing the tin-foil envelope while it was still in the confines of the trunk, we cannot see how petitioner's free and unequivocal consent

can be spelled out. The very fact that petitioner was in custody during all of this of itself spells out the additional burden that fell upon the State. The failure of the police officers ever to request permission to search justifies the conclusion that the intended removal of the contents for safekeeping was nothing more than an afterthought and a subterfuge.

The following three recent cases where this Court granted *certiorari* to review the refusal of State Courts to suppress evidence acquired under alleged unlawful searches involved situations nowheres near as flagrant as what occurred in the case at bar:

Foley v. *Conn.*, 375 U. S. 85 (1963)—search resulting from information illegally acquired, rejected.

Stover v. *Calif.*, 376 U. S. 483 (1964)—consent by a hotel clerk to search defendant's room, rejected.

Beck v. *Ohio*, 379 U. S. 89 (1964)—search of defendant's person without reasonable grounds therefor, rejected.

CONCLUSION

For the reasons herein urged, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ZUCKER, LOWENSTEIN, GURNY AND ZUCKER,
SAUL J. ZUCKER,
744 Broad Street,
Newark, New Jersey, 07102,
Counsel for Petitioner.

APPENDIX A

Oral Conclusions of Middlesex County Court Denying Application to Suppress

* * *

The Court: Gentlemen, we have another interesting question arising out of search and seizure. Fortunately, by reason of agreement, we don't have the question of whether or not there was a search incidental to an arrest. The question is was the police officer making a search at the time he discovered the tinfoil envelope which later proved to have within it what appeared to be Marijuana.

I can go only on the basis of the evidence before me. If the police officer was forcing a search or forcing this young man to disclose what he had in his car, if he forced him to open his trunk, I would say clearly that he violated the rights of the defendant. But there is no evidence of that. The evidence, on the contrary, is that the police officer had suggested to these young man that they bring their personal belongings into the police station and that there they were going to be tagged and kept, and it was even suggested why it was done, because of experience that the police had had in that area with cars being looted and things being stolen from cars.

More specific than that, we have the testimony of the officer who said, "I didn't intend it to be a search, if it was a search. I was going to hand it to him," meaning he was going to hand the packet back to the young man. But in the process, he discovered a substance that looked like Marijuana to him.

Upon looking at it more closely and smelling it, he then decided that it was Marijuana and, thereafter, he made a search.

I say that the police officer had a legal right to do that because there is no evidence here that he did anything unreasonable. As a matter of fact, from the whole evidential picture, what the police officers did and, more specifically, what this police officer who just testified did, was proper. It was reasonable.

I, again, point out something that is elementary. Every search, if it were a search, is not unconstitutional. The Fourth Amendment prohibits unreasonable searches. In the cases, including *Preston,* they point out that with respect to motor vehicles, the attitude of the Court has to be different than if it were a search in one's home or a search of one's private papers.

Here we had a motor vehicle. We had a situation that, in the first instance, indicates there was no search.

Now, the argument that the police had a duty to inform these young men of their rights under the Fourth Amendment, I don't know any case that supports that contention. I am aware of the *Miranda* and *Escobedo* cases, and more especially the *Miranda* case, that places an affirmative duty on the police officer with respect to testimonial evidence given by the defendant who is in custody or where a charge is against him and he doesn't have the advice and help of a lawyer. I am aware of that. But that doesn't apply to tangible objects. That doesn't apply to the situation at bar.

Quite aside from that, the undisputed testimony is from the officer in question that he didn't intend to make a search and that he was only being courteous and helpful, and that

he was going to hand that packet back to the young man when he discovered this unusual substance. Thereafter, after deciding in his own mind that it was Marijuana, he then made a search, and I say that he had a right thereafter to make a search, as well as the duty to do so in view of what he observed.

I find no violation of the Fourth Amendment here. What the policeman did, in view of all the circumstances, I think, was reasonable.

Is there anything further, gentlemen?

Mr. Schwartz: No, your Honor.

Mr. Zucker: I wish there was, your Honor.

The Court: All right. For the reasons stated, the motion is denied.

APPENDIX B

Order Denying Motion to Suppress

MIDDLESEX COUNTY COURT

STATE OF NEW JERSEY,

Plaintiff,

vs.

WILLIAM HAILPARN,

Defendant.

CRIMINAL PROCEEDINGS

ORDER DENYING APPLICATION TO SUPPRESS
PURSUANT TO R.R. 3:2A-6

Application having been made by Zucker, Lowenstein, Gurny and Zucker by Saul J. Zucker, attorneys for defendant, upon due notice to the Prosecutor of Middlesex County for an Order suppressing alleged contraband seized by police of New Brunswick following an arrest charging defendant with inability to give a good account of himself, and a Complaint formally charging unlawful possession of marihuana under R.S. 24:18-4 having been filed in the New Brunswick Magistrate's Court, and said defendant claiming to be aggrieved by an unlawful search and seizure, as a result of which said formal Complaint charging a violation under R.R. 24:18-4 had been filed; *and the Prosecutor having conceded in open Court upon oral argument before the undersigned on August 21, 1967, that the alleged search of defendant's motor vehicle was not incidental to*

Appendix B

or contemporaneous with the first charge and arrest charging defendant with inability to give a good account of himself; and the Court having examined the Complaint, and Notice to Suppress, the transcript of the proceedings in the New Brunswick Magistrate's Court, the testimony of the arresting officer and defendant's formal Brief and having duly considered the same, and having heard oral argument by the said Saul J. Zucker, attorney for the defendant, and Peter J. Schwartz, Esq., appearing for the Prosecutor of Middlesex County, and having duly considered the same;

It is on this 23rd day of August, 1967,

ORDERED, that the application to suppress the seized evidence be and the same is hereby denied.

W. THOMAS MCGANN,
Judge

APPENDIX C

Order of Appellate Division of the Superior Court Denying Petitioner's Application for Leave to Appeal

MOTIONS ORDER ON PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-1-67

MOTION NO. M-25-67

BEFORE PART C

STATE OF NEW JERSEY

vs.

WILLIAM HAILPARN

Moving Papers Filed: September 5, 1967

Answering Papers Filed: September 15, 1967

Datd Submitted to Court: September 18, 1967

Date Argued:

Date Decided:

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Appendix C

Motion for Leave to Appeal Denied

Leave to Appeal as Indigent

Assignment of Counsel

Transcript

ORIGINAL FILED

SEPT. 21, 1967

A-1

MORTIMER G. NEWMAN JR.
Clerk

EDWARD GAULKIN
S.J.A.D.

Witness, the Honorable Edward Gaulkin, Senior Judge of Part C, Superior Court of New Jersey, Appellate Division, this day of Sepember, 1967.

MORTIMER G. NEWMAN JR.
Clerk of the Superior Court

I hereby certify that the foregoing is a true copy of the original on file in my office.

MORTIMER G. NEWMAN JR.
Clerk of the Superior Court

APPENDIX D

Order of Supreme Court of New Jersey, Denying Application for Certification to Review Order of Appellate Division

SUPREME COURT OF NEW JERSEY
C-56 SEPTEMBER TERM 1967

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

WILLIAM HAILPARN,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION
ORDER DENYING PETITION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 14th day of November, 1967.

A TRUE COPY

JOHN H. GILDEA
Clerk

FILED
Nov. 14, 1967
JOHN H. GILDEA
Clerk

APPENDIX E

New Jersey Statute Relating to Application to Suppress—N.J.S.A. 3:2A-6(a)

3:2A-6. Motion for Return of Property and to Suppress Evidence

(a) On notice [to the applicant for the warrant and] to the prosecutor of the county in which the penal proceedings is pending or threatened and to the applicant for the warrant, if the search was with a warrant, and pursuant to Rules 3:5-5 and 5-11-1, a person claiming to be aggrieved by an unlawful search and seizure, and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding may apply only to the Superior Court or County Court for the county in which the evidence was obtained for the return of property seized and to suppress the evidence obtained, even though the offense charged or to be charged may be within the jurisdiction of a municipal court. A brief stating the facts and the arguments in support of the motion shall be submitted with the notice of motion. If material facts are disputed, testimony thereon shall be taken in open court. Such motion shall be made within 30 days after the initial plea to the charge unless for good cause the court shall enlarge the time. The motion shall be determined before trial. A motion may be entertained at trial only if the court finds the defendant could not reasonably have made the motion prior to trial.

If a motion made pursuant to this rule is granted, the property shall be delivered to the person entitled thereto, unless otherwise subject to lawful detention, and shall not be admissible in evidence in any court.

Appendix E

If a timely motion is not made in accordance with this rule, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained.

(b) In the absence of bad faith, no search or seizure by virtue of a search warrant shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in the execution of it.

APPENDIX F

The Fourth Amendment to the United States Constitution

The Fourth Amendment reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

APPENDIX G

The New Jersey Statute Under Which Petitioner was Charged with Possessing Contraband (Marihuana)— N.J.S.A. 24:18-4

24:18-4. Unlawful manufacture, possession, sale, etc.

It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized by this chapter.

APPENDIX H

Complaint in New Brunswick Magistrate's Court Charging Petitioner with Violation of N.J.S.A. 24:18-4

CITY OF NEW BRUNSWICK,
STATE OF NEW JERSEY,
COUNTY OF MIDDLESEX, } ss.

Ptl. Raymond Curry, Police Dept. of the City of New Brunswick in the County of Middlesex and the State of New Jersey, upon his oath complains that on the 25th day of July A. D., 1967 at the City of New Brunswick, in the county aforesaid William Hailparn. In that the defendant did possess a Narcotic Drug, to wit, Marihuana, contrary to R.S. 24:18-4 AND THEREFORE He prays that the said William Hailparn may be apprehended and held to answer to said complaint, and dealt with as law and justice may require.

PTL. RAYMOND CURRY

Sworn and subscribed before
me this 25th day of July, 1967

MEYER J. COHEN
Magistrate

Attest:

JOSEPH J. HOAGLAND,
Court Clerk

Appendix H

THE STATE OF NEW JERSEY
To any Constable, Police Officer, or Marshal, or any Officer authorized to serve warrants:

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX, } ss.:

WHEREAS, the within complaint hath been made before me, the Magistrate of the City of New Brunswick, these are, therefore, in the name of the State of New Jersey, to authorize and to require you to apprehend the said William Hailparn if in your County he may be found and bring him forthwith before me, the Magistrate, as aforesaid, to answer to the said complaint and be further dealt with as the law directs. Hereof you are not to fail and for so doing this shall be your sufficient warrant.

Given under my hand and seal this
25th day of July one thousand,
nine hundred and Sixty Seven.

MEYER J. COHEN
Magistrate of the City of New Brunswick

Attest:

JOSEPH J. HOAGLAND,
Court Clerk

APPENDIX I

The Manner in Which the Federal Question Was Raised in the Magistrate's Court

Mr. Zucker:

* * * I don't know whether your Honor wants me to elaborate on that right now, but this is not the first time that this particular kind of situation has arisen. The Fourth Amendment to the Federal Constitution has protected this very type of situation where the defendant is arrested for a vagrancy charge or failure to give a good account of himself and some time elapses so that the search cannot be held to be incidental to the original arrest. There can be no search of the—of the house or of an automobile without a warrant.

* * *

APPENDIX J

The Manner in Which the Federal Question Was Raised in Middlesex County Court

NOTICE OF MOTION TO SUPPRESS PURSUANT TO R.R. 3:2A-6

PLEASE TAKE NOTICE, that defendant, William Hailparn, claiming to be aggrieved by an unlawful search and seizure, and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding (a complaint having been filed in the New Brunswick Magistrate's Court charging unlawful possession of marihuana under R.S. 24:18-4), hereby applies to the Middlesex County Court (the County in which the evidence was obtained) for an Order directing the return of the property seized and to suppress the evidence seized.

The within application will be moved before the Middlesex County Court at the Court House in New Brunswick, New Jersey, before Honorable Charles M. Morris, Jr., Acting Assignment Judge—or such other Judge to whom said application may be referred—on Monday, August 21, 1967 at 9:30 a.m. or as soon thereafter as counsel can be heard.

This application is based upon the proceedings in the New Brunswick Magistrate's Court, of which a copy of the complaint is attached hereto and incorporated herein by reference, and a transcript of the preliminary examination before Honorable Meyer Cohn on August 10, 1967—establishing a violation of defendant's rights against unlawful search and seizure under the Fourth Amendment to the Federal Constitution.

Served herewith is a brief upon which defendant will rely upon the oral argument.

DATED: August 14, 1967

ZUCKER, LOWENSTEIN, GURNY AND ZUCKER
Attorneys for Defendant
By: SAUL J. ZUCKER

APPENDIX K

Manner in Which Federal Question Was Raised in Appellate Division

The grounds of appeal are substantial:

1. Involved herein is the deprivation of defendant's Federal constitutional rights against unlawful search and seizure guaranteed to him under the Fourth Amendment to the Federal Constitution.

APPENDIX L

Manner in Which Federal Question Was Raised in Supreme Court of New Jersey

Statement of Question Involved

1. In the absence of an incidental or contemporaneous legal arrest, can a search of defendant's motor vehicle without a supporting search warrant be anything but unreasonable and illegal under the Fourth Amendment to the Federal Constitution?

APPENDIX M

Cross Examination of Police Officer in Magistrate's Court

Cross-examination by Mr. Zucker:

Q. Mr. Curry, you know, do you not, that the defendant, Hailpern, is just 18 years old? A. Do I know it definitely?

Q. Yes. A. I know he said he was 18, yes.

Q. And when you first saw him, you brought him to headquarters on a charge of failure to give a good account of himself. A. When we first took him to headquarers there wasn't any charge. We trying to locate his registration for the car.

Q. Why did you arrest him? A. He wasn't arrested. He drove his car in himself.

Q. Didn't you direct him to go to headquarters? A. No, I told him to go to headquarters and see if we could locate the ownership certificate.

Q. And while you were traveling to headquarters, didn't you have a loudspeaker in which you told him where to make turns? A. That's right. I was directing him to police headquarters.

Q. So that at least during that period he was under your control and his departure was certainly restrained. Isn't that so? A. I imagine so.

Q. You wouldn't have permitted him to drive down Route 1 and go south. A. No, sir, because he didn't produce the registration for the car.

Q. Then you did arrest him at the moment that you directed him to go to headquarters, did you not? A. I did not place him under arrest, no.

Q. What do you call it when you say to a driver of an automobile: "You drive to headquarters and don't go any-

where else except as I direct you''? You don't regard that as an arrest? A. I didn't say that to the man. I said we wanted to find the registration for the car. He couldn't produce a registration for that car, so rather than have it towed in, I let him drive it in, because we would have confiscated it without the registration. So, at police headquarters we told him to double-check his car for the registration, and he did.

Q. You would not have permitted him to continue south. A. No, sir, I would not.

Q. Now, how long did it take to go from Great Eastern to police headquarters A. At that time of the morning, three minutes, four minutes.

Q. It's about a mile or two from Great Eastern to police headquarters? A. About that, yes. About three miles at the most.

Q. And at the scene of Great Eastern, you recall that these two young men had told you that they had bought the automobile the day before and had paid $900— A. Yes, sir.

Q. —to a man whose name you don't remember, but it sounds something like ''Kurt.' A. Kurt, K-u-r-t, I believe it is.

Q. And they maintained that throughout, didn't they? A. They said that they bought it from him, yes.

Q. Now, how much time elapsed at police headquarters before you went outside? A. What do you mean?

Q. Before you went outside and opened the trunk. A. When we first arrived, we double-checked his glove compartment and we were still unable to produce the registration. Then we brought him into headquarters and he was told he was under arrest for failure to give a good account of himself, and then we went back outside again to get his belongings. I don't know how long it was.

Appendix M

Q. At that point then you did consider him under arrest for failure to give a good account of himself. A. Right. I didn't believe his story.

Q. That was after you got to police headquarters. A. Right, when he still couldn't produce any ownership certificate.

Q. And at what point did you tell him what his rights were? Did you tell him that at the Great Eastern lot? A. No, down at police headquarters, right after I informed him he was under arrest.

Q. And when he was under arrest, at that point the automobile was outside and you and the two young men were inside. Isn't that right? A. Yes, I believe it was.

Q. Now, how much time elapsed from the time that you told him that he was under arrest to the time that you went outside? A. Fifteen or twenty minutes, I imagine.

Q. Now, you told him to bring his belongings inside, didn't you? A. Right.

Q. You directed him to do that, didn't you? A. I told him to get his belongings and bring them to police headquarters.

Q. And you didn't have any search warrant at that time, did you? A. I didn't search the car—

Q. Well— A. —until after we found the marijuana.

Q. By what right did you tell him to bring his belongings inside? A. So that they would be protected, so they wouldn't be stolen from the car. We have no facilities to protect the car if the car stays in the parking lot out there. The belongings are brought into headquarters and placed behind the front desk.

Q. Now, when you went outside, you said, "Take your luggage out," didn't you? A. I don't remember the exact words. I said, "Take your belongings out."

Q. And he said, "Why should I do that"? Isn't that right? A. I don't remember him saying that.

Q. And you said, "Because I'm telling you to do it." A. In fact, I remember telling him to take his belongings out and bring them to police headquarters. He walked right out and opened the trunk up with the key.

Q. And you said, "Pull out that suitcase," didn't you? A. I said, "Take your suitcase out."

Q. And he said, "What for?" A. I don't ever remember him questioning me at all. They took it out. He didn't say a word.

Q. Who is "They"? A. Gaines and him were both there. Hailparn pulled it out.

Q. Now, at that time they didn't have anybody advising them what their rights were, did they? They didn't have a lawyer. A. At the time they took it out?

Q. From the time you told them they were under arrest. A. No, sir.

Q. They didn't have anybody to tell them they didn't have to open the trunk, did they? A. No, sir.

Q. So, at least to the point of you directing them to open the trunk and bring their belongings in there, that was a direction from you, wasn't it? A. I don't ever remember telling him to open the trunk. I told him to get his belongings, and he opened the trunk. Then I told him to take his suitcase and bring it into police headquarters.

Q. Now, as of the time that you say that you spotted a tinfoil envelope containing something that looked like green tea and when you came across the Martinson can, you didn't know what was in there, did you? A. I don't understand.

Q. You didn't know what was in those two containers. A. Did I know for a fact what was in them?

Q. Yes. You didn't know for a fact what was in them. A. I didn't know for a fact, no.

Q. You're sure of that. A. In my mind I thought I knew what it was.

Q. But you didn't know for a fact what was in there. A. Not for a fact, not positively.

Q. Yet you swore to a complaint on that same day that Hailparn was guilty of possessing narcotics—marijuana. A. Not until after I went to Trenton and had it checked by the Division of Narcotics up there.

Q. This is your signature, is it not? A. That's right, sir.

Q. Do you notice when it was sworn to? A. July 25th.

Q. Didn't you say that it was just yesterday that you got the report from Trenton? A. I brought the stuff up, and on the 25th the chemist or the man up there gave me a visible identification as marijuana. This is just the official report that I picked up yesterday from the chemist. He told me up there the 25th of July—it was sometime in the morning—that this was marijana.

I came back to police headquarters and I signed a complaint against—

Q. Just a moment. I hadn't asked you any question on that. When did you make this arrest? A. We stopped them around 1:15. It must have been 1:30 or so. This arrest for narcotics or the failure to give a good account.

Q. Did you make two arrests? A. I charged him with failure to give a good account of himself.

Q. When was that? A. Early in the morning, around 1:30 or 2 o'clock, something like that.

Q. And that was on the 25th of July. A. That was on the 25th of July.

Q. And you received the report from Trenton yesterday,

didn't you? A. I took the material to Trenton on the 25th of July.

I didn't go to sleep. I went right to Trenton. I didn't go home.

Q. When did you swear to this complaint? A. On the 25th of July. I don't remember exactly what time it was. I believe it was—must have been in the afternoon because I went to Trenton in the morning.

Q. But you didn't know for a fact that it was marijuana until you got the report. A. I didn't know for a fact until I was told by the chemist at state police headquarters that it was marijuana. Then I returned to police headquarters and signed a complaint against Hailparn and Gaines for possession of marijuana.

Q. Now, when you found these two cans—these two containers, rather, Hailparn said he didn't know anything about this, didn't he? A. That's right.

Q. And he persisted in that? A. Yes.

Q. And he said he had just gotten the car "yesterday," the day before you picked him up? A. I think he said "Yesterday."

Q. And he never changed that statement of his that he didn't know anything about those two containers in the trunk of his car. A. Not to my knowledge, he didn't.

Q. And insofar as you know, there was nothing to challenge that statement of his that he didn't know that they were in there, as far as you know. A. You mean whether I believed him or not.

Q. No, so far as you know. A. I didn't believe him. That's what I said.

Q. I'm not asking you for your belief. Did you take any steps to ascertain whether there was any substance to his statement that he didn't know they were in the car?

Appendix M

Did you take any steps to check that out? A: You mean question him?

Q. Any way. A. I asked him and he told me he didn't know anything about it. He also told me that the car wasn't stolen.

Q. Now, will you try to answer the question which I'm asking you. A. Yes, sir.

Q. Did you take any steps at all to check whether his statement was true that he didn't know that these containers were in the car? A. I don't know what kind of steps I could take.

Q. I'm asking if you took any. A. No.

Q. And so far as you knew, this car had just been acquired by him the preceding day. A. That's what he told us.

Q. And insofar as you know, you never found anything to the contrary, did you? A. As far as I know, the car didn't even belong to him.

Q. But so far as you know, he never got possession of the car other than the day before. A. I don't know that either. I don't know when he got possession of the car.

Q. I say you don't know anything contrary to his statement. A. The only thing I know is he had a car and he didn't have the registration, and the marijuana was in the car. That's the only thing I know.

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APPENDIX N

Cross Examination of Police Officer in County Court

Cross examination by Mr. Zucker:

Q. Officer, when you told the defendant that he was under arrest at police headquarters, did you tell him the nature of the charge that he was being held for? A. We told him that he was under arrest for failure to give a good account of himself. Both of them we told. Not just the defendant here.

Q. Did you mention any specific statutory reference? A. No, sir.

Q. Would you recognize the name of the—the number of the statute if I mentioned it to you? A. No, I don't believe I would, sir. We charged them under a city ordinance, failure to give a good account of themselves.

Q. Now, then fifteen or twenty minutes elapsed before anything else happened, wasn't there? A. About that, fifteen, twenty minutes.

Q. And where were you during that time and where were they? A. We were in—right at the front desk, police headquarters.

Q. Now, it must have been somewheres around 2 o'clock in the morning or quarter after 2? A. Well, let's see. It was around 1:15 we first observed them. We talked to them out there for about ten or fifteen minutes. About quarter of 2, 2 o'clock, something like that.

Q. Well, did you carry on any conversation with them during that fifteen or twenty minutes? A. We were asking them about the car, where they got the car, and why they didn't have the registration and things like that.

Q. And they— A. They couldn't come up with any good answers. That is why I placed them under arrest. I don't know if the car was stolen or what it was.

Q. I am talking about now, what was done in the fifteen or twenty minutes after you placed them under arrest and before you went out in the police yard. A. I don't remember exactly what went on, but I say fifteen, twenty minutes. I don't know. It might have been ten minutes. It might have been more. It might have been twenty-five minutes. I don't know how long it was. We placed them under arrest. We informed them of their rights without saying anything without a lawyer, and then in a few minutes or so we told them to go out and get their belongings and bring them into police headquarters.

Q. You say it might have been fifteen minutes or it might have been twenty-five minutes. It might have even been longer. Isn't that so? A. I don't know exactly how long it was, sir. I am just guessing when I say fifteen, twenty minutes.

Q. In the course of that conversation, you didn't tell them that their property was jeopardized and you wanted it inside for safekeeping, you didn't say that? A. I didn't tell them that. I told them to get their belongings and bring them into police headquarters.

Q. No, of course not. And you had as much as twenty-five minutes within which to tell them that, didn't you? A. could be that long. I couldn't swear to how long it was. It might have been less.

Q. And then when you did finally tell them to go outside and bring their belongings in, did you tell them what would happen to them if they didn't go outside and bring their belongings in? A. I didn't tell them anything about what would happen. I don't know what would happen to them.

The Court: You mean to their belongings or to them?

The Witness: To them. Is that what he means, what would happen to them?

Q. Yes. A. I don't know what would have happened. We would have put them in the cell, probably, if they didn't want to bring them in.

Q. What would you have done with the property if they didn't go out and open the car for you? A. Probably left it there. The circumstances didn't occur. I don't know what would have happened. He was more worried about his dog than he was worried about anything else. We made arrangements for his dog to be taken care of.

Q. That was a matter of considerable concern with him, wasn't it? A. The dog was, yes, more than anything else.

Q. Now, when you didn't tell him that the purpose of bringing their belongings in was for safekeeping, you then said—you went out there and you said open up the trunk, didn't you? A. I don't remember telling him open up the trunk. I told him to get his be longings out, and he opened the trunk.

Q. He opened the trunk and then he stopped, didn't he, and then you said, "Take that brown suitcase out"? A. As I remember it, he opened the trunk and I said to him, take your belongings out. I don't remember whether I said suitcase or not. I might have said suitcase out. Take your suitcase out and bring it into headquarters.

Q. Let me recall your testimony in the magistrate's court to refresh your recollection. When I was interrogating you there, I said, "And you said pull out that suitcase, didn't you?" And then your answer was, "I said take your suitcase out." A. If that is what I said, that is what I said, take your suitcase out.

Q. And then did he proceed to pull the suitcase out? A. Yes, sir.

Q. It was wedged in pretty tight with everything else? A. Right.

Q. And as he pulled that suitcase out, this tinfoil fell into the floor of the trunk? A. Right.

Q. Didn't fall outside, did it? A. No, sir, it fell into the floor of the trunk.

Q. Now, at that moment you didn't know what was in there, did you? A. No, I did not.

Q. And then you went out and you picked it up, didn't you? A. I just picked it up off the ground there.

Q. Yes. And then on the strength of what you did at that time, then you made—there is no question but after that happened, you made a full search of the trunk? A. After I started to hand it to him and saw that the greenish stuff was coming out, I opened it up and thought it was Marijuana and then we searched the trunk.

Q. Now, up to the time that you pulled that tinfoil envelope from inside the trunk and put it in your hands, you had no idea what was in there, did you? A. I pulled it, sir?

Q. Didn't you pick it up? A. Yes, I picked it up.

Q. That is what I mean. A. No, I had no idea of what was in the envelope at all. It felt like meat to me.

Q. Did you ask him whether you could pick it up? A. No, I did not.

Q. You did that of your own volition, didn't you? A. Yes.

Q. That was a search wasn't it? A. I didn't intend it to be a search, if it was a search. I was going to hand it to the boy and put it with his belongings. I thought it belonged to him.

Mr. Zucker: That is all, your Honor.

APPENDIX O

Concession by Prosecutor that Search Was Not Incidental to Arrest

The Court: I don't like to interrupt, Mr. Zucker, and I am not doing it to throw you off, certainly, but, Mr. Schwartz, would you agree here that this alleged search, and I haven't been convinced that it was a search, was not incidental to the original arrest?

Mr. Schwartz: No doubt about it.

The Court: Then we don't have to argue that point anymore. That is clear.